



**SO ORDERED.**

**SIGNED this 12 day of May, 2006.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**CHERYL RUTH YAPP,**

**DEBTOR.**

**CASE NO. 04-40891  
CHAPTER 7**

**CHERYL RUTH YAPP,**

**PLAINTIFF,**

**v.**

**ADV. NO. 06-7012**

**ERNEST PUGH,**

**DEFENDANT.**

**MEMORANDUM AND ORDER  
GRANTING MOTION TO REMAND CASE TO STATE COURT  
AND MAKING RELATED FINDINGS**

The adversary action is a divorce proceeding initially filed in the District Court of Riley County, Kansas, Case No. 02 DM 363 and removed to this Court by Application for Removal of Civil Action in Riley County, Kansas, to Federal District Court filed on January 17, 2006, after issues concerning the Debtor's discharge arose in state court. The Debtor appears by Mark Neis, Neis & Michaux, P.A. Defendant appears by Joseph I. Wittman. There are no other appearances.

The substantive motions pending are the following: (i) Debtor's Motion for Stay of Proceedings Including Stay of Order Granting Judgment Against Debtor After Hearing January 5, 2006, in District Court of Riley County, Kansas (Doc.3) and the Defendant's objection thereto (Doc. 9); (ii) Debtor's Amended Motion for Stay of Enforcement of Order Dated February 15, 2006, Granting Judgment of \$7,000 against Cheryl Ruth Yapp in Favor Of Ernest L. Pugh, Defendant. (Substantially identical to Doc. 3, but includes subsequent order) (Doc. 12); (iii) Debtor's Motions to Set Aside and Vacate Order Dated February 15, 2006, Granting Judgment Against Cheryl Ruth Yapp, to Reconsider, Alter or Amend the Order, and/or for New Trial. (Docs.10 &11); and (iv) Defendant's Motion for Remand (Doc. 16), to which Debtor objected (Doc. 18).<sup>1</sup>

The background circumstances are as follows. Prepetition Debtor filed a petition for divorce against Defendant in the Riley County District Court. A Memorandum of Decision addressing property division and allocation of debt was filed in that action on November 14,

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<sup>1</sup> Also pending are: (1) Debtor's Motion to Allow Filing One Day Out of Time Debtor's Objection to Defendant's Motion to Remand Matter to State Court (Doc. 19); Defendant's Objection to Motion to Allow Filing of Objection by the Debtor Out of Time on Motion for Remand (Doc. 20); and Response to Creditor's Objection to Debtor's Motion to Allow Filing One day Out of Time Debtor's Objection to Defendant's Motion to Remand with Declaration of Debtor's Attorney in Support (Doc. 23).

2003. On April 13, 2004, Debtor filed a petition under Chapter 7. Debtor was granted a discharge on August 11, 2005. On August 12, 2005, after having been granted relief from stay on March 17, 2005, Defendant filed a Motion to Enforce Divorce Decree (hereinafter “Motion”) in the divorce action seeking a judgment against Debtor for a marital debt which he had paid but which he contended was the responsibility of the Debtor under the Memorandum of Decision. Debtor was served with the Motion on October 31, 2005. A hearing on the Motion was held on January 5, 2006. The state court judge in his oral findings rejected Debtor’s defense that a judgment against her was barred by her bankruptcy discharge and held that the Defendant was entitled to judgment.

To obtain an adjudication of this Court whether her obligations to the Defendant stated in the Memorandum and Order entered in the divorce were discharged,<sup>2</sup> Debtor filed her notice of removal of the state court divorce action to this Court on January 17, 2006.<sup>3</sup> Notice of the removal was filed in the Riley County District Court on the same day. On February 5, 2006, the state court judge entered an Order Settling Journal Entry granting judgment in the amount of \$7000 against the Debtor in favor of the Defendant.

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<sup>2</sup> On April 23, 2006, Debtor filed an additional adversary case against Defendant, Case No. 06-7027, wherein she seeks money damages, declaratory relief, and an injunction under the authority of 11 U.S.C. 524, effective of discharge, based upon the facts which are alleged as the basis of the various motions pending in this case. Without in any way prejudging the merits of that new case, the Court notes that it appears to be a more straight forward manner of placing the issue of discharge before the Court.

<sup>3</sup> Debtor’s application for removal was captioned in the District Court for the District of Kansas, but was filed in this Court. Because the district courts have referred cases under title 11 to the bankruptcy courts, direct removal from state court to the bankruptcy court has been approved. *Cook v. Cook*, 215 B.R. 975 (Bankr. E.D. Mich. 1997). See also Norton Bankruptcy Law and Practice 2d, Bankruptcy Rules, Editor’s Comment Rule 9027, ¶ (a) (2005-06) (“the application must be filed in the bankruptcy court”).

Debtor removed this case pursuant to 28 U.S.C. § 1452 and Fed. R. Bankr. P. 9027. Subsection (a) of the statute provides that “a party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.” A review of Debtor’s filings in this Court convinces the Court that Debtor intends to remove the entire state court divorce action, not only the claim asserted in the Motion.<sup>4</sup>

Section 1334 of title 28, referred to in § 1452, is the basic bankruptcy jurisdiction statute. It grants jurisdiction to the district courts of all civil proceedings arising under title 11, or arising in or related to cases under title 11. The parties have not contended that this Court lacks jurisdiction over the removed state court divorce action. The Court finds that it has jurisdiction. The divorce was a cause of action belonging to the Debtor when her Chapter 11 case was filed, and the outcome of the divorce, which concerned the allocation of property and obligations, could have an effect upon the estate being administered by the bankruptcy court. The state court divorce action therefore is related to the bankruptcy proceeding within the meaning of § 1334.<sup>5</sup>

Removal is effective after the filing of the notice of removal in both the federal court and the court from which the action is removed. Rule 9027(c) provides:

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<sup>4</sup> The Court’s determination of the effectiveness of the removal and its ruling on the motion to remand are equally applicable whether the entire state court divorce action was removed or only the Motion filed in that action was removed.

<sup>5</sup> *E.g., Christie v. Chong*, No. C-02-0472 EDL, 2002 WL 598428 (Bankr N.D. Cal. April 10, 2002) (holding bankruptcy court had related to jurisdiction over removed divorce action which involved the allocation of property); see 1 Collier on Bankruptcy ¶ 3.01[4][c][ii][A] (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 15th ed. Rev. 2006) (causes of action owned by the debtor on the date of filing are within the related to jurisdiction). Alternatively, even if this court should lack jurisdiction over the entire state court divorce action, it undoubtedly has jurisdiction over the claim asserted in the Motion, as the Debtor’s affirmative defense relates to her bankruptcy discharge. *Willett v. Willett (In re Willett)*, No. 96-1118, 1996 WL 910907 (Bankr. E.D. Va. May 9, 1996).

**(c) Filing in Non-Bankruptcy Court.** Promptly after the filing of notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim cause of action is remanded.

“Although the procedure to remove contemplates the filing of an application, the Rule does not require a court order. Removal is automatic on the filing of a copy with the court from which that matter is to be removed.”<sup>6</sup> The general federal court removal statute, 28 U.S.C. § 1446 is similar to Rule 7027 and provides that upon completion of the steps to effectuate removal, “the state court shall proceed no further.” A significant number of cases construe this provision to mean that “any further proceedings in the state court are considered coram non judice and will be vacated by the federal court, even if the removal subsequently is found to have been improper and the case is remanded back to that state court.”<sup>7</sup>

This means the state court divorce action was removed to this Court on January 17, 2006, when Debtor’s counsel filed the application for removal in this Court and also filed a copy of the application for removal with the Riley County District Court. Removal was automatic and did not require the bankruptcy court to rule upon the application or otherwise enter an order. Thus this Court acquired jurisdiction of the divorce on January 17, 2006, and the Riley County District Court lost jurisdiction on the same day. The state court had no jurisdiction to enter the judgment against the Debtor on February 16, 2006. That judgment is void.

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<sup>6</sup> Norton Bankruptcy Law and Practice 2d, Bankruptcy Rules, Editor’s Comment Rule 9027, ¶ (c) (2005-06).

<sup>7</sup> 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3737 (3rd ed. 1998); see *California v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000).

Next, the Court considers the Defendant's motion to remand for failure to file the removal within the time limits established by Rule 9027 and Debtor's objection to the motion to remand.<sup>8</sup> Rule 9027(a)(2) provides:

**(a) Notice of Removal.**

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(2) Time for Filing; Civil Actions Initiated Before Commencement of the Case under the Code. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code... .

(3) Time For Filing; Civil Action Initiated After Commencement of the Case Under the Code. If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

The wording of the rule indicates that the time limits are mandatory, as the rule states that the "notice of removal may be filed with the clerk *only* within" the relevant limits. Further, there is substantial authority reaching this conclusion.<sup>9</sup>

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<sup>8</sup> As noted in note 1 above, the Defendant objected to the Debtor's objection to the motion to remand on the ground that the objection was filed out of time. The Court overrules the objection, preferring to decide this issue with the benefit of all arguments. The Court notes even if the motion to remand had not been filed, the Court sua sponte could have raised and ruled upon the matter of the timeliness of the removal, so the filing or non-filing of the motion to remand and/or objection to the motion are not determinative of the Court's authority to remand the case.

<sup>9</sup> See *Driggers v. Exch. Parts of Am., Inc. (In re Exch. Parts of Am., Inc.)*, 138 B.R. 585 (Bankr. W.D. Ark. 1992) (holding failure of the debtor to file application for removal within 30 days of receiving

The Court grants the motion to remand because the notice of removal was not timely filed. The divorce action was pending on April 13, 2004, the date of filing the bankruptcy. The notice of removal was filed on January 17, 2006, long after 90 days after the order for relief and more that 30 days after the March 17, 2005 order terminating the stay as to the claim to be asserted by Defendant.<sup>10</sup> The Debtor has not sought an extension of time to file the application for removal.<sup>11</sup> The Court therefore finds the case should be remanded for failure to timely file for removal.

Remand renders moot the pending motions for stay of proceedings (Doc. 3 & 12) and to set aside, vacate and/or to reconsider, alter or amend the order of February 15, 2006 (Doc 10 & 11). The Court therefore does not rule on these matters.

For the foregoing reasons the Court holds as follows: The Order Settling Journal Entry filed in the state court on February 15, 2006, granting judgment in favor of Defendant against

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service of summons and complaint in state court suit required remand); *E.F. Wonderlic and Ass. v. Parma, Inc. (In re Tandem Enter., LTD.)*, 124 B.R. 283 (Bankr. N.D. Ill. 1991) (case not timely removed); *Doan v. Loomis (In re Fort Dodge Creamery Co.)*, 117 B.R. 438, 442 (D.N.D. Iowa. 1990) (court did not find any authority for considering equitable arguments about why case should be resolved by bankruptcy court when deciding whether removal was timely under Rule 9027(a)(2)); and *Allen County Bank & Trust Co. v. Valvmatic Int'l*, 51 BR 578 (D.N.D. Ind. 1985) (Debtor's removal petition was untimely).

<sup>10</sup> Alternatively, if the application to remove is construed to remove only the Motion which asserts the claim for indemnification, then removal is also untimely because it was not filed within the longer of 30 days of the filing of the Motion on August 12, 2005 or 30 days after the service on the Debtor on October 31, 2005.

<sup>11</sup> Fed. R. Bankr. P.9006, addressing time, by not including removal applications under Fed. R. Bankr. P. 9027 as actions for which extension is excluded by subsection (b)(2), permits extensions of time to file removal applications. When there is no motion to enlarge made within the time permitted for removal, Fed. R. Bankr. P. 9006(b)(1) allows enlargement to be granted only "on motion . . . where the failure to act was the result of excusable neglect." In this case, there has been no motion for enlargement of time to file an application for removal, and there is no suggestion of grounds for a finding of excusable neglect.

Debtor is set aside as void because it was entered after removal when this Court, not the state court, had jurisdiction of the divorce action; the case is remanded to the District Court of Riley County, Kansas because the notice of removal was not timely filed; and the Debtor's motions for stay (Doc. 3 & 12) and to set aside, vacate and/or reconsider, alter or amend the February 15, 2006 order (Doc. 10 & 11) are moot.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

**IT IS SO ORDERED.**

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